



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Stephen E. Harriman AIA & Associates

File: B-248973.4

Date: November 23, 1994

Stephen E. Harriman for the protester.
Armando B. Alvarez, Esq., and Paul M. Fisher, Esq.,
Department of the Navy, for the agency.
Christina Sklarew, Esq., and Michael R. Golden, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Cancellation of requirement for architectural-engineering services is unobjectionable where the record supports the agency's determination that its needs have changed, so that the solicited services are no longer needed.

DECISION

Stephen E. Harriman AIA & Associates protests the Department of the Navy's cancellation of solicitation No. N62474-91-D-9709, which was issued by the Naval Facilities Engineering Command for architectural-engineering (A-E) services for various interior design projects in the western United States and Alaska. We deny the protest.

In accordance with procedures prescribed in the Brooks Act for the procurement of professional A-E services,¹ the Navy published a notice in the Commerce Business Daily (CBD) on September 25, 1991, announcing the requirements and evaluation criteria for the selection of a firm to provide interior design A-E services. The notice proposed an indefinite quantity architectural-engineering services contract. It listed a maximum estimated value of the

¹See 40 U.S.C. § 541 et seq. (1988). The Brooks Act requires federal agencies to select contractors on the basis of demonstrated competence and qualifications; the procedures do not include price competition. Once a firm is selected as the most highly qualified to provide the services, the agency is required to negotiate a contract at a fair and reasonable level of compensation.

contract for a 1-year period, with an option for an additional year, and stated that the minimum guaranteed fee for the contract was \$12,500.

Fifteen firms responded to the CBD notice. Four of these firms, including Harriman, were selected for further consideration. When another firm, Henderson Design Group, was initially chosen as the most highly qualified firm, Harriman filed a protest with our Office, contending that the selection had been improperly made. After reviewing its award decision, the agency withdrew its selection of Henderson, and Harriman withdrew its protest. Harriman, the second-ranked firm, was then selected. On July 10, 1992, the agency notified Harriman of its selection and intent to send it a request for proposal "in the near future" for negotiation of a fee. The agency, in its notice, cautioned that:

"[A]ward of a contract, or any commitment for payment by the Government, is contingent upon the successful negotiation of an equitable fee for those services. Any costs incurred prior to such negotiation . . . cannot be reimbursed. Costs of such nature are considered to be for the benefit of your firm and are incurred at your discretion."

Apparently, from this notice in July until January 1993, no fee negotiations were conducted.

In January 1993, the project engineer identified a potential project at the Naval Postgraduate School in Monterey, California, as the initial job order for Harriman, and proposed to begin negotiations with the firm. However, the agency reports that problems regarding the nature of the project and the scope of the solicitation resulted in various revisions to the statement of work and delayed negotiations with Harriman. In the meantime, the school withdrew the requirement from the agency and proceeded to have the work performed by in-house staff from the Naval Public Works Center in San Francisco.

At one point during this period, the protester was advised by an agency official that although Harriman could negotiate a contract without a specific scope of work, it would be in Harriman's best interest to wait for an actual project. According to the protester, the agency official told Harriman that this would delay the contract performance period for as long as possible.

On March 15, 1993, the Secretary of Defense submitted a list of military installations recommended for closure or realignment. The list included 12 Naval Bases serviced by the Western Division, Naval Facilities Engineering Command.

The following October, the contracting officer contacted the architectural branch to ascertain whether any interior design work was contemplated. The agency was prepared to negotiate a contract with Harriman for any such work, or to cancel the procurement if no interior design projects were anticipated. The design manager told the contracting officer that he did anticipate such work for potential projects at Travis Air Force Base, and thus the contracting officer did not cancel the requirement at that time. However, the project engineer for the one project that had been identified at Travis later decided to accomplish the design work in-house. In June 1994, when the contracting officer again asked the architectural branch about the availability of projects appropriate for Harriman, he was told that none was anticipated. It was at this point that the contracting officer decided to cancel the requirement. Harriman was advised by letter of July 12 that unforeseen developments in the agency's acquisition program eliminated the requirement for the services, and that the procurement had been canceled. This protest followed.

Harriman argues that the agency intentionally denied it work in retribution for its protest against the proposed award to Henderson, arguing that it is inconceivable that there have been no A-E services of this type required for projects anywhere in the areas covered by this procurement. The protester argues that it is entitled to the minimum fee that was guaranteed in the CBD notice, either as a direct payment or for work that the firm will perform.

A contracting agency has broad discretion to determine when it is appropriate to cancel a procurement conducted under Brooks Act procedures and may do so by establishing a reasonable basis for the cancellation. Encon Management, Inc., B-233329.2, Dec. 5, 1988, 88-2 CPD ¶ 564. In this regard, agencies should be afforded the same discretion to cancel as in other types of procurements. Parkey & Partners Architects, B-217319, Mar. 22, 1985, 85-1 CPD ¶ 336. An agency may cancel a procurement where the goods or services are no longer required. Billings Am. Indian Council, B-228989; B-228989.2, Dec. 29, 1987, 87-2 CPD ¶ 639. As a general rule, we do not review agency decisions to cancel procurements and to perform work in-house, since these decisions are matters of executive branch policy. See William Michael Cunningham, B-249206, Oct. 22, 1992, 92-2 CPD ¶ 271. Where, however, the protester argues that the agency's rationale is but a pretext--that the agency's actual motivation is to avoid awarding it a contract or is

in response to the filing of a protest--we will examine the reasonableness of the agency's actions in canceling the requirement. Id.

We conclude that the cancellation in this case was reasonable. The record supports the agency's explanation that the Navy's needs had changed so that the agency no longer required the services. When the procurement initially was advertised in the CBD, it reflected the Navy's expectation that interior design work would be required at many of the installations that were later recommended for closure. The record shows, for example, that local bases in the San Francisco Bay Area have historically been a source of interior design requirements; thus, the closure of these activities (and the potential for further closures in 1995) had the effect of canceling or delaying anticipated design projects. As base closures and downsizing eliminated those requirements, the agency's in-house staff became available to perform projects such as the ones the contracting officer had anticipated contracting out to Harriman.

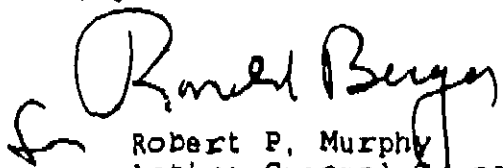
Harriman contends, nevertheless, that the Navy should have been able to find some projects for the firm, and contends that the agency had a responsibility to negotiate a contract with Harriman, since Harriman considered this to be a condition of withdrawing its protest against the proposed award to Henderson. We disagree. While the Navy proposed to negotiate a contract with Harriman after it withdrew its protest, the agency decided to delay fee negotiations and contract award until an actual project was identified. Harriman did not object to this decision. During the ensuing 2-year period, the agency sought to identify opportunities for Harriman and canceled the requirement when it became clear that no work would become available. An agency properly may cancel a procurement, no matter when the information precipitating the cancellation first surfaces or should have been known, even if firms have already submitted their qualification statements and incurred costs in pursuing the award. Source AV, Inc., B-241155, Jan. 25, 1991, 91-1 CPD ¶ 75.

Finally, regarding Harriman's assertion that it is entitled to the "minimum fee" that was guaranteed in the CBD notice, Harriman was advised in the initial selection notice that this fee was contingent on the successful negotiation of a contract. Harriman was also subsequently advised that it was in its best interest to delay negotiations until a project was identified. While Harriman suggests that the Navy avoided negotiating a contract with the firm in order to avoid incurring this fee, we find nothing in the record

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to support suggestions of bad faith or an intent to harm the protester on the agency's part. Rather, the record suggests that Harriman acquiesced in the delay in negotiating a contract.

The protest is denied.


Robert P. Murphy
Acting General Counsel